IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CIVIL APPLICATION NO.106 OF 2007
IN
REVIEW PETITION {STAMP} NO.388 OF 2007
IN
WRIT PETITION NO.644 OF 2000
AND
REVIEW PETITION {STAMP} NO.388 OF 2007
IN
WRIT PETITION NO.644 OF 2000

Shri Nivruti G. Ahire,
Age 72, r/o Shalaka,
Flat No.107, Opp: Cooperage
Football Ground, M.K. Road,
Mumbai-400 021. .... Petitioner

- Versus -

1. The State of Maharashtra
   through Principal Secretary,
   Finance Department,
   Mantralaya, Mumbai-400 032.

2. The Dy. Secretary,
   Finance Department,
   Mantralaya, Mumbai-400 032.

3. The Special Officer,
   Departmental Enquiries,
   Bombay Division, Bombay.

4. The Commissioner of Sales
   Tax, Vikrikar Bhawan,
   Mumbai-400 010. .... Respondents

Sarvasri J.P. Cama, Senior Advocate, with
Uday P. Warunjikar and D.M. Galani, Advocates
for the Petitioner/Applicant.

Shri C.R. Sonawane, Asst. Government Pleader,
for the State.

CORAM: R.M.S. KHANDEPARKAR &
Dr. D.Y. CHANDRACHUD, JJ.

DATED: JUNE 13, 2007

JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Heard at length the Advocates for the parties. This is an application for condonation of delay of 108 days in filing the application for review of the order dated 23-8-2006 passed in Writ Petition No.644 of 2000.

2. The applicant herein was employed in the Sales Tax Department of the Government of Maharashtra as a Deputy Commissioner of Sales Tax for the period from 31-3-1989 to 26-11-1993. During the said period, he was required to pass orders relating to refund of the excess payment of sales tax on consideration of the reports submitted in that regard by the Sales Tax Officer or the Assistant Commissioner of Sales Tax. The refund orders were issued by the applicant for a total amount of Rs.95,57,681/- in six cases under his signature. The refund orders in three cases thereof were issued on the same day on which the proposals were received by him from the Sales Tax Officer. In one case, it was issued on the day following the day on which the proposal was placed before the applicant. In the fifth case, it was issued a week thereafter and in the sixth case, after a

period of fortnight. Holding that the applicant did not take due care to verify and/or scrutinise the proposals submitted by the officers before issuing the refund orders and thereby caused loss to the tune of Rs.95,57,681/- to the public exchequer, and in the process, the applicant failed to perform his duties diligently and vigilantly and failed to take care to ascertain the genuineness of the claims for refund and the proposals submitted in that regard by the Sales Tax Officers, notices were issued to the concerned officers including the applicant by the Government of Maharashtra under the order dated 30-11-1994 for initiating departmental inquiry. The necessary memo in that regard was issued to the applicant which was sought to be challenged by the applicant before the Maharashtra Administrative Tribunal by filing Original Application No.108 of 1995. Meanwhile, the applicant retired on attaining the age of superannuation on 30-11-1994. The Tribunal placing reliance on the Circular dated 20-1-1988, which required the concerned authority to attend to the refund claim promptly, quashed the order dated 30-11-1994 under which departmental proceedings were sought to be initiated against the applicant. The order in that regard was passed by the Tribunal on 18-6-1999, which came to be challenged in Writ Petition No.644 of 2000 on behalf of the Government and after hearing the parties, the petition was allowed by the

judgment dated 23-8-2006. After disposal of the petition, the S.L.P. was filed and after the dismissal thereof, the present application has been filed for condonation of delay in filing the review application.

3. It is the case of the petitioner/applicant that the applicant applied for the certified copy of the order dated 23-8-2006 on 13-10-2006. The same was ready on 17-10-2006 but was received by the applicant on 8-11-2006. Thereafter the papers were entrusted to an Advocate practising in the Supreme Court for filing petition for special leave under Article 136 of the Constitution of India. The S.L.P. was filed on 13-11-2006 and was listed for preliminary hearing on 1-12-2006 when the Supreme Court was pleased to dismiss the same. The application for certified copy of the order of the Supreme Court was filed on 4-12-2006 and the same was received by the applicant on 6-12-2006. Thereafter, within 30 days the present application has been filed. It is the case of the applicant that the applicant is not guilty of gross negligence and in the interest of justice, the Court should condone the delay in filing the review application.

4. Various judgments were sought to be relied upon and they included **Union of India and another v. K.S. Subramanian,** reported in (1976) 3 SCC 677 = AIR 1976 SC

2433, **Abbai Maligai Partnership Firm and another v. K. Santhakumaran and others,** reported in 1998 AIR SCW 4061 = (1998) 7 SCC 386 = AIR 1999 SC 1486, **National Housing Coop. Society Ltd. v. State of Rajasthan and others,** reported in (2005) 12 SCC 149, **Yogendra Narayan Chowdhury and others v. Union of India and others,** reported in (1996) 7 SCC 1 = AIR 1996 SC 751, **Kunhayammed and others v. State of Kerala and another,** reported in (2000) 6 SCC 359 = AIR 2000 SC 2587, **K. Rajamouli v. A.V.K.N. Swamy,** reported in AIR 2001 SC 2316 and **Suseel Finance & Leasing Co. v. M. Lata and others,** reported in (2004) 13 SCC 675. In addition to the above decisions, it would be also necessary to consider two more decisions, viz., **Parsion Devi and others v. Sumitri Devi and others,** reported in (1997) 8 SCC 715 and **Smt. Meera Bhanja v. Smt. Nirmala Kumari Choudhury,** reported in AIR 1995 SC 455.

5. Considering the application having been filed in terms of Section 5 of the Limitation Act, 1963, the point which is to be considered is whether there is sufficient cause disclosed by the applicant for filing the review application beyond the period of 30 days from the date of the judgment dated 23-8-2006, since the period of limitation for filing the review application is 30 days.

6. Perusal of the application for condonation of delay and on consideration of the arguments advanced in support of the application, three causes have been enumerated and contended to be disclosing sufficient cause for the delay in filing the review application and they are (i) time spent in obtaining the certified copy; (ii) S.L.P. proceedings before the Apex Court, and (iii) no gross negligence on the part of the applicant.

7. As regards the time spent in obtaining the certified copy, the law on the point is very clear that for the purpose of filing review application, no certified copy is required. Being so, merely because some time was spent in obtaining the certified copy, that itself cannot be a ground for condoning the delay. The learned Advocate for the applicant, however, is justified in contending that in order to draft the review petition, the applicant would require the copy of the order which is sought to be reviewed. The contention cannot be disputed. However, for that purpose, one need not wait to obtain a certified copy of the order and even an authenticated copy of the judgment can be obtained from office of the Court. In fact, that is the practice followed in this Court and authenticated copies are allowed to be issued by the office of the Court. Such authenticated copies are made available on the very day on which the judgment is signed by the Judge. The

records do disclose that the Advocate for the applicant had collected such copy of the judgment dated 23-8-2006 on 12-9-2006 from the Court office.

8. In any case, undisputedly, the certified copy of the judgment dated 23-8-2006 was received by the applicant on 8-11-2006. The review application was filed only on 8-1-2007. It is the case of the applicant that the applicant was pursuing the remedy of the S.L.P. before the Apex Court.

9. It is true that a S.L.P. was filed on 13-11-2006 and the same was rejected on 1-12-2006 and the copy of the order of rejection was received by the applicant on 6-12-2006. It is only thereafter that the applicant has filed the present application. Though it is claimed to have been filed within 30 days, in fact, it was filed after 32 days from the date of obtaining the certified copy of rejection of the S.L.P. and not from the date of obtaining of the certified copy of the order in question.

10. Though the applicant has claimed that he is not guilty of gross negligence, there is no explanation whatsoever forthcoming from the applicant as to what prevented the applicant from filing the review petition immediately after obtaining either the authenticated

copy on 12-9-2006 or the certified copy of the order in question on 8-11-2006, either prior to the filing of the S.L.P. or simultaneously or immediately thereafter. There is absolutely not a whisper about the cause for the delay in filing the review application either from 12-9-2006 onwards, or from 8-11-2006 onwards or even for the period from 6-12-2006 till 8-1-2007, apart from merely claiming that the applicant is not guilty of gross negligence. Whether a party is guilty of negligence, gross or otherwise, does not depend on mere claim in that regard by either of the parties to the proceedings but it should be disclosed from the facts placed on record by the person who wants to contend that he is not guilty of negligence. The application and the affidavit filed by the applicant are totally silent in this regard.

11. It is pertinent to note that the application for the certified copy of the order in question was itself filed beyond the period of 30 days. While the order was dated 23-8-2006, the application for the certified copy was made only on 13-10-2006. Obviously, if the application was filed for the purpose of preferring review, it would have been filed immediately after the order was declared and it is not the case of the applicant that the applicant was unaware of the fact that review application was required to be filed within

30 days of the date of the order. Evidently therefore, the certified copy of the order in question was obtained only for the purpose of filing the S.L.P. as the same can be preferred within 90 days from the date of the order.

12. The application or the affidavit in support thereof nowhere discloses any reason or cause for non-filing of either the application for certified copy or non-filing of the application for review within 30 days from the date of the order in question. Similarly, there is also no explanation as to why the review application was not filed immediately after rejection of the S.L.P. and why the applicant had to wait for 33 days after dismissal of the S.L.P.. In short, there is no cause shown for non-filing of the application for review within 30 days from the date of the order in question. Only reason for filing the review is rejection of the S.L.P..

13. On the face of the application itself, therefore, it is a clear case of total negligence, in the absence of disclosure of any sufficient cause for condonation of delay in filing the application for review.

14. The Apex Court in **Ramlal's** case (supra), while construing Section 5 of the Limitation Act has held that the Court should bear in mind two important

considerations while dealing with the explanation for condonation of delay. Firstly, that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree holder to treat the decree as binding between the parties and this legal right which accrues to the decree holder by lapse of time should not be light-heartedly disturbed, and secondly, that if sufficient cause for the delay is shown, discretion is given to the Court to condone the delay. The Apex Court, however, has further ruled that:

> "It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the Court by S.5. **If sufficient cause is not proved nothing further has to be done; the application for condoning the delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay.** This aspect of the matter

> naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration; but the scope of the enquiry while exercising the discretionary power after sufficient cause is shown would naturally be limited only to such facts as the Court may regard as relevant."
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> (Emphasis supplied)

15. In order to entertain an application for condonation of delay, the appeal or the application in respect of which there has been delay on the part of the applicant, and the condonation of which is sought for, the same must be maintainable in law. If the main application for review is itself not maintainable in law, question of condonation of delay in filing such an application would not arise at all. In the case in hand, admittedly, the applicant had preferred the S.L.P. and the same was rejected by the Apex Court and only thereafter the applicant thought of filing the present review application.

16. In relation to the point as to whether in the facts and circumstances of the case where the S.L.P. has been rejected against the judgment dated 23-8-2006 the review

application would be maintainable, it has been strenuously argued on behalf of the applicant that till and until the order of this Court has not been merged in the order passed by the Apex Court, nothing prevents this Court from entertaining the review application in relation to its order. It is further submitted on behalf of the applicant that the order passed in the S.L.P. is a non-speaking order in as much as that it merely rejected the S.L.P. without disclosing any reason for rejection and without considering the matter on merits and that the respondents had neither appeared nor had advanced any argument opposing the matter on merits and, therefore, it cannot be said that the judgment dated 23-8-2006 has been merged in the order of rejecting the S.L.P. passed by the Apex Court.

17. The order passed by the Apex Court rejecting the S.L.P. reads thus:

> "UPON hearing counsel the Court made the following
>
> O R D E R
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> We see no reasons to interfere. The Special Leave Petition is dismissed."

The order undoubtedly does not disclose any appearance on behalf of the respondents before the Apex Court. At

the same time, it specifically discloses the counsel for the applicant having been heard. The Apex Court found that there was no reason to interfere in the judgment dated 23-8-2006 passed by this Court and that therefore the S.L.P. was dismissed. In other words, it cannot be said to be a non-speaking order or that it does not disclose any reason as such. On the contrary, it expressly discloses the opinion expressed by the Supreme Court that there was no reason to interfere in the order passed by this Court and that therefore the S.L.P. was rejected.

18. Referring to the decision in **Kunhayammed's** case (supra), it was strenuously argued that the Three Judges Bench of the Apex Court has ruled that when the S.L.P. is dismissed without assigning any reason, it only means that it is not a fit case to grant S.L.P. and there is no opinion expressed on the merits of the case and, therefore, it would not prevent the party from seeking review of the order passed by the High Court.

19. In **Kunhayammed's** case, the Apex Court after taking note of various earlier decisions, has held that:

> "Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set

> aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below."

It has been further held that while hearing the petition for special leave to appeal, the Apex Court is called upon to see whether the petitioner should be granted such leave or not. While hearing such petition, the Apex Court does not exercise its appellate jurisdiction; it merely exercises its discretionary jurisdiction to grant or not to grant leave to appeal. The petitioner is still outside the gate of entry though aspiring to enter the appellate arena of the Supreme Court. Whether he would be able to enter it or not would depend on the fate of the petition for special leave. If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Court that a case for invoking the appellate jurisdiction of the Court is not made out. Having held so, the Apex Court further held that in case of dismissal of the special leave petition without reason, all that can be said to have been decided by the Court is that it was not a fit case where special leave should be granted and it may be so due to

various reasons. It is further ruled that whatever may be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e., it does not assign any reason for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. At the same time, it was also observed that:

> "the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunal in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, this Court being the Apex Court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view

> contrary to the one expressed by this Court."

Ultimately it was held that:

> "Mere rejection of a special leave petition does not take away the jurisdiction of the court; tribunal or forum whose order forms the subject-matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of

> Article 141 of the Constitution. **The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court.** However this would be so not by reference to the doctrine of merger."
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> (Emphasis supplied)

20. In **Yogendra Narayan Chowdhury's** case (supra), it was held that it is settled law that the dismissal of special leave petition in limine without assigning reasons does not operate as res judicata.

21. In **Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust and another,** reported in (1978) 3 SCC 119 = AIR 1978 SC 1283, it was held that when the order is not a speaking order, one finds it difficult to accept the argument put forward on behalf of the party that it must be deemed to have implicitly

decided all the questions in relation to the merits of the award. The Apex Court, therefore, observed that it would be improper to rule that dismissal of a writ petition in limine by a non-speaking order would certainly be a bar in the entertainment of another writ petition filed by the same party on the same cause of action.

22. In **Abbai Maligai's** case (supra), the parties had filed special leave petition being aggrieved by the order of the High Court. The other side appeared on caveat in the Supreme Court and after hearing both the sides, the special leave petition was dismissed. After dismissal of the special leave petition, the party filed review petition before the High Court in relation to its order. In fact, such review application was filed after delay of 221 days. The learned single Judge not only condoned the delay of 221 days but also reviewed its earlier order. While setting aside the said order, the Apex Court held that:

> "The manner in which the learned single Judge of the High Court exercised the review jurisdiction, after the special leave petitions against the self-same order had been dismissed by this Court after hearing learned counsel for the

> parties, to say the least, was not proper. Interference by the learned single Judge at that stage is subversive of judicial discipline. ..... The High Court, therefore, had no power or jurisdiction to review the self-same order, which was the subject matter of challenge in the SLPs. in this Court after the challenge had failed. By passing the impugned order on 7-4-1994, judicial propriety has been sacrificed. After the dismissal of the special leave petitions by this Court, on contest, no review petitions could be entertained by the High against the same order."

The facts of **Abbai Maligai's** case are more or less similar to the facts of the case in hand. Only difference is that in Abbai Maligai's case the Advocate for both the parties were heard before dismissal of S.L.P.. But the fact remains, that the review application was filed only after the dismissal of the special leave petition.

23. It is pertinent to note that in **Kunhayammed's** case, the special leave petition was dismissed with the order which read as under:

"Special leave petition is dismissed on merits."

With reference to this order, the Apex Court held that considering the order passed by the Apex Court while dismissing the special leave petition, it could not be said that the order of the High Court had merged in the order of the Apex Court dismissing the S.L.P. and, therefore, the review of the order of the High Court was maintainable.

24. Plain reading of the decision of the Apex Court in **Kunhayammed's** case would, therefore, disclose that in cases where the S.L.P. is rejected by an order without assigning any reason as well as by assigning reason, it would nevertheless be an order in relation to the special leave to appeal and, therefore, would be before the entry of the appeal in the appellate arena and hence the doctrine of merger would not apply. However, mere non-application of the doctrine of merger would not entitle the Courts lower in hierarchy to ignore any opinion expressed by the Apex Court, either on the point of fact or law in the order rejecting the S.L.P. and to entertain review application in relation to the order which was the subject-matter of the special leave petition. It is so because though the order of the

lower Court would not merge in the order rejecting the S.L.P., yet to express any opinion in conflict with or in departure from the view taken by the Apex Court in relation to any fact or law would be subversive of judicial discipline and an affront to the order of the Apex Court.

25. In **Sumitri Devi's** case (supra), it was held that an error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47 Rule 1 of the C.P.C.. In exercise of the jurisdiction under Order 47 Rule 1 C.P.C. it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise". It was held that there is a clear distinction between an erroneous decision and an error apparent on the basis of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction.

26. In **Smt. Meera Bhanja's** case (supra), it was held that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1 of the C.P.C.. The power of review

may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct errors committed by the Subordinate Court. It has to be kept in mind that an error apparent on the face of the record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions. Referring to the decision in **Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale** {AIR 1960 SC 137}, it was observed that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.

27. The order passed by the Apex Court in the case in hand specifically states about absence of reasons to

interfere in the order passed by this Court in Writ Petition, and on that count the S.L.P. was dismissed. The said order cannot be said to be an order disclosing no reason. On the contrary, the order specifically states that "We see no reasons to interfere.". Obviously the interference spoken of was in relation to the order dated 23-8-2006 passed in Writ Petition No.644 of 2000, which is sought to be reviewed. Once the Apex Court has opined that it finds no reason to interfere in the said order of this Court, to entertain an application for review of such an order would virtually amount to entertain an application for expressing an opinion different from the one expressed by the Apex Court in such order. Such an act would virtually amount to judicial indiscipline, though it may not be an affront to the order of the Apex Court.

28. For the reasons stated above, neither the applicant has been able to disclose sufficient cause for the condonation of delay of 108 days in filing the review petition nor do we find the review application itself being maintainable in the facts and circumstances of the case. Hence the application for condonation of delay is dismissed with costs. Consequently, the review petition also stands dismissed.

(Dr.D.Y.Chandrachud, J.) (R.M.S.Khandeparkar, J.)

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